

STREET NAME: _____

TOWN OF SMITHFIELD
AND

ENCROACHMENT AGREEMENT
RIGHT OF WAY OR OTHER TOWN PROPERTY
STANDARD FORM

This Encroachment Agreement is made as of the ___ day of _____, 20____, by and between the Town of Smithfield (“Town”) and _____ (the “Applicant”).

WITNESSETH:

WHEREAS, on _____, 20____, the Applicant submitted an application for permission to encroach on certain public street and/or street right(s) of way (hereinafter, “Public Streets”) under Town’s jurisdiction or on other Town-owned property (hereinafter, “Town Property”), along with a site plan; and

WHEREAS, based on Applicant’s submittals, such proposed encroachment will not substantially impair or hinder the use of the Public Streets as a way of passage or the use of Town Property for its intended purpose; and

WHEREAS, Town is willing to exercise its authority in accordance with N.C.G.S. 160A-265, 160A-296 and the Town of Smithfield Code of Ordinances to permit the Applicant to encroach on the Public Streets or Town Property in the locations, and for the purposes described below.

NOW, THEREFORE, the parties agree as follows:

1. Permission to Encroach. The Town hereby grants the Applicant non-exclusive, revocable permission (subject to applicable law) to encroach over Public Streets located at _____ or on Town Property located at _____, for the purpose of construction and/or erection and maintenance of _____, as more particularly described in the attached plan (“Facilities”) attached hereto as *Exhibit A* and incorporated herein by reference, subject to the lawfully imposed terms and conditions set forth in Town of Smithfield Code of Ordinances (the “Code Conditions”) and those stated below (the “Permission”). The installation, operation, and maintenance of the Facilities are sometimes referred to herein as “the Work.” Applicant understands and agrees that, notwithstanding any language in this Agreement to the contrary, Town grants Permission only to the extent authorized by law and the terms of the conveyance of the right-of-way, fee, easement, or other property interest to Town in the Public Streets or Town Property.

2. The Applicant’s Obligations. In addition to the requirements set forth in the Code Conditions, the Applicant, its successors and permitted assigns shall:

(a) provide proper signs, signal lights, flagman and other warning devices for the protection of traffic in conformance with the latest Manual on Uniform Traffic Control Devices for Streets and Highways (“MUTCD”) and amendments or supplements thereto (which can be obtained on line or from the Public Works Director of the Town) during any installation and maintenance of the Facilities that the Applicant places in the Public Streets or on Town Property pursuant to this Agreement; provide at least three (3) business days’ notice to Town of any work which will require lane closure or traffic control measures lasting more than twenty-four

hours; and ensure that temporary pedestrian accessibility is provided in accordance with Americans with Disabilities Act Accessibility Guidelines and the MUTCD;

(b) install, operate and maintain the Facilities at Applicant's sole cost and expense in accordance with Town's Standard Specifications and Details, as such may be amended from time to time, and other Town policies and otherwise in such a safe and proper condition that installation, operation and maintenance of Facilities will not endanger or otherwise interfere (i) with use of a Public Street as a way of passage, (ii) with traffic on any Public Street, (iii) with the maintenance of any Public Street, (iv) with operation or maintenance of any other Town-owned infrastructure located within or adjacent to the Public Street, including but not limited to underground fiber and water, sewer, or reclaimed water lines, (v) with operation or maintenance of any other infrastructure or equipment located within the Public Street, so long as such infrastructure or equipment is lawfully present within the Public Street, or (vi) with use, operation, or maintenance of any Town Property;

(c) promptly repair any damage to the Public Streets, all Town-owned infrastructure, facilities, or structures, and all other areas disturbed during installation and maintenance of the Facilities, including but not limited to pavement, sidewalk, curb and gutter, drainage systems, signs, pavement markings, underground fiber, and water, sewer, or reclaimed water lines, and shall restore to the condition existing prior to Applicant's disturbance, re-establishing grass cover with seeding and spreading of straw for finishing, all to the satisfaction of Town, which shall not be unreasonably withheld or delayed;

(d) exercise reasonable precaution during construction and maintenance of the Facilities to prevent soil erosion, silting or other pollution of any surface water or groundwater, and otherwise comply with reasonable requirements of the Town Public Works Director;

(e) give written notice to the Town Public Works Director within 48 hours prior to the start of work. Upon completion of the work, notify the Town's Public Works Director and request a final inspection. Contractor shall complete any punch list items noted during the final inspection prior to acceptance of the work by the Town;

when any work is to be scheduled and later completed on or near a highway open to traffic is completed pursuant to this Agreement and meet with the of the Town for inspection and approval of the work to insure the work meets Town standards;

(f) reimburse Town for any costs or expenses of Town, reasonably incurred, for any repairs or maintenance to the Public Streets, any Town-owned infrastructure, facilities, structures, or other areas resulting from or related to the installation, operation, maintenance or existence of the Facilities, following receipt of invoices from the Town detailing those costs (and including supporting documentation evidencing them if available and requested by Applicant);

(g) within a commercially reasonable time, remove or alter the Facilities at its cost, at Town's request in the event that Town or its contractor need to conduct work in the relevant areas, where the Facilities are in conflict with such work (as reasonably determined by the Town) and unless applicable law provides otherwise;

(h) understand and agree that damage or destruction may occur to Facilities and other property of Applicant in the course of Town's operations and that Town has no obligation to protect Applicant, Applicant's property or Facilities or to minimize, mitigate or avoid any such damage;

(i) understand and agree that Permission is non-exclusive, that additional encroachments by others may be permitted in the Public Streets or Town Property ("Third Party Encroachments"), and that Town is not liable for any damage to Facilities that arise from the installation, maintenance, or existence of Third Party Encroachments; and that any recourse for such damage must be from the Third Party Encroacher;

(j) release, waive, and discharge any legal rights to seek payment or relief of any kind from the Town, its officers, boards, commissions and employees, for any damages resulting from Third Party Encroachments;

(k) indemnify, defend and hold harmless the Town, its officers, boards, commissions, employees, and contractors from and against any and all damages, loss, costs, expense and claims and liabilities, including reasonable attorneys' fees and court costs, that arise from the installation, maintenance or existence of the Facilities, the restoration of the area disturbed by the installation, maintenance or existence of the Facilities, and Applicant's activities or items in the Public Streets or on Town Property; and

(l) comply with all applicable Federal, State, and local laws. Applicant, and all subcontractors, shall comply with Article 2, Chapter 64, of the North Carolina General Statutes. Applicant certifies that Applicant, and all subcontractors, are not on the Iran Final Divestment List ("List") created by the North Carolina State Treasurer pursuant to N.C.G.S. 147-86.58. Applicant shall not utilize any subcontractor that is identified on the List.

3. **Term.** **The term of this Agreement is ten (10) years (the "First Term"). At the end of the First Term, the Agreement shall automatically renew for successive one-year terms** unless terminated by either party as provided herein or unless superseded by a new or amended agreement. Either party may terminate this Agreement upon thirty days written notice to the other party. Notwithstanding the foregoing, the grant of Permission to encroach shall become void, and this Agreement terminated, if the Applicant does not begin installation of the Facilities within one (1) year of the date of this Agreement (unless mutually agreed upon in writing by the parties) and thereafter diligently pursue installation to completion.

4. **Other Requirements.** This Agreement is further subject to the following conditions or requirements:

(a) Applicant binds itself, its successors, permitted assigns and legal representatives to the terms of this Encroachment Agreement. This Encroachment Agreement may not be assigned without the prior written consent of the Town. Applicant may subcontract the Work, provided that the Applicant shall be and remain responsible for the Work and all required insurance and financial security. All entities performing the work must be North Carolina licensed and bonded contractors.

(b) The Applicant shall procure and maintain liability and worker's compensation and other insurance at all times during performance of any work under this Agreement and any approved permit applications, in the amounts and under the terms stipulated on the **Schedule of Insurance** attached as **Exhibit B**. The Applicant shall deliver to Town a certificate of insurance evidencing such coverage, and that Town is an additional insured. Should any of the described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.

(c) At the time of execution of this Agreement, the Applicant shall furnish a Performance Bond as agreed with the Public Works Director in an amount not less than the sum of \$10,000 or the estimated cost of construction or erection of Facilities, whichever is the higher amount, as security for the faithful performance of this Agreement for the term of this Agreement. The Performance Bond shall be with a Surety acceptable to Town and shall be in the form and amount as stipulated on the attached **Exhibit C Performance Bond Form**, incorporated herein by reference.

(d) In the event of conflict between the requirements of this Encroachment Agreement or the Code Conditions, the more restrictive requirement shall apply.

(e) Applicant must comply with all relevant provisions of the Town of Smithfield Code of Ordinances, including but not limited to Sections 9 ("Licenses, Permits and Regulations"), 10 ("Motor Vehicle and Traffic"), 17 ("Streets") and 18 ("Utilities") as they may be amended from time to time. The Town prohibits

performing “any excavation or other work adjacent to or near” the Town’s water or sewer system (including reclaimed water system) or the making “of any street or other repairs which might endanger said water or sewer system on any legal holidays of the town or on Saturdays or Sundays without prior written permission of the town manager.”

5. Notice. Notices to Applicant under this Agreement shall be sent to the following address:

Notices to Town under this Agreement shall be sent to the following address: **231 Hospital Road/ PO Box 761, Smithfield, NC 27577, Attn: Public Works Director.**

6. Recitals. The Recitals are incorporated herein.

7. Other. Neither party waives any rights it may have under applicable law with respect to the subject matter in this Agreement. There are no third party beneficiaries to this Agreement. Town may convert the signed original of this Agreement to an electronic record pursuant to an approved North Carolina Department of Cultural Resources procedure and process for converting paper records to electronic records for record retention purposes. Such electronic record of this Agreement shall be deemed for all purposes to be the original signed Agreement. The individual signing Agreement has the right and power to do so and bind Grantee to the obligations set forth herein and such individual does so warrant that he/she has such authority.

8. Miscellaneous:

(a) Clause Control. Due to the volume of venter and independent contractor agreements submitted to the Town of Smithfield that would be too time consuming to redraft, this miscellaneous paragraph (subparagraphs a-n) is being inserted in Town Contracts and the provisions of this miscellaneous paragraph will control over all other provisions of the contract.

(b) Merger and Modification. This instrument constitutes the entire agreement between the parties and supersedes any and all prior agreements, arrangements and understandings, whether oral or written, between the parties. All negotiations, correspondence and memorandums passed between the parties hereto are merged herein and this agreement cancels and supersedes all prior agreements between the parties with reference thereto. No modification of this instrument shall be binding unless in writing, attached hereto, and signed by the party against whom or which it is sought to be enforced.

(c) Waiver. No waiver of any right or remedy shall be effective unless in writing and nevertheless shall not operate as a waiver of any other right or remedy or of the same right or remedy on a future occasion.

(d) Caption and Words. The captions and headings contained herein are solely for convenience and reference and do not constitute a part of this instrument. All words and phrases in this instrument shall be construed to include the singular and plural number, and the masculine, feminine or neuter gender, as the context requires.

(e) Binding Effect. This instrument shall be binding upon and shall insure to the benefit of the parties and their heirs, successors and permitted assigns.

(f) North Carolina Law. This instrument shall be construed in accordance with the laws of North Carolina without giving effect to its conflict of laws principles.

(g) Forum Selection. In any action arising from or to enforce this agreement, the parties agree (a) to the jurisdiction and venue exclusively of the state courts in Johnston County, North Carolina.

(h) Limitation of Liability. No party will be liable to another party, or to the extent this agreement may limit the same to any third party, for any special, indirect, incidental, exemplary, consequential or punitive damages arising out of or relating to this agreement, whether the claims alleges tortuous conduct (including negligence) or any other legal theory.

(i) Two Originals. This instrument may be executed in two (2) or more counterparts as the parties may desire, and each counterpart shall constitute an original.

- (j) Follow Through. Each party will execute and deliver all additional documents and do all such other acts as may be reasonably necessary to carry out the provisions and intent of this instrument.
- (k) Authority. Any corporate party or business entities and its designated partners, venturers, or officers have full and complete authority to sell, assign and convey the contracts and assume the obligations referred to herein; said corporations or entities are in good standing under North Carolina law.
- (l) Severability. If any one or more of the terms, provisions, covenants or restrictions of this agreement shall be determined by a Court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, provisions, covenants and restrictions of this Contract shall remain in full force and effect and shall in no way be affected, impaired or invalidated. If, moreover, any one or more of the provisions contained in this Contract shall for any reason be determined by a Court of competent jurisdiction to be excessively broad as to duration, geographical scope, activity or subject, it shall be construed, by limiting or reducing it, so as to be enforceable to the extent compatible with the then applicable law.
- (m) Contract Termination. The Town may terminate this contract without cause on 5 days' notice.
- (n) Pre-Audit Certification. This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act to assure compliance with NCGS 159-28.

Greg Siler, Finance Director

9. Street Interest. Applicant acknowledges that the interest of the Town in its streets is usually an easement by dedication and seldom a fee simple title interest. Therefore, **Applicant understands and agrees that, notwithstanding any language in this Agreement to the contrary, Town grants Permission herein only to the extent authorized by law and as well as any limitation in the grant or dedication of the street to the Town.** Furthermore, the Town is not authorized to grant an easement in any public street that is maintained by the State or part of the State Highway System. Recognizing the statutory authority of GS 160A-273 and 160A-296, Town makes no representation that the use proposed by Applicant is a Public Use within the terms of the grant or dedication to the town. Applicant acknowledges that the owner of the fee under the street could claim the use proposed by Applicant to be a burden as may be set forth in case law such as Hildebrand v Southern Bell Tele. And Tele. Co, 219 NC 402 or Watkins v. Young-Lambe, 37 NC App 30. Applicant will indemnify the Town from any loss by virtue of the construction and/or erection and maintenance by Applicant pursuant to the proposed encroachment including but not limited to any allegation that the Applicant has exceeded the scope of the authority of the Town under its easement.

IN WITNESS WHEREOF, each of the parties to this agreement has caused the same to be executed in the day and year first above written.

[SIGNATURES ON FOLLOWING PAGES]

TOWN OF SMITHFIELD

BY _____ **(SEAL)**
Michael L. Scott, Town Manager
Town of Smithfield

State of North Carolina - County of Johnston

I, the undersigned Notary Public of the County of Johnston and State aforesaid, certify that _____ personally came before me this day and acknowledged that _____ is the Town Manager of the Town of Smithfield a North Carolina Municipal Corporation, and that by authority duly given and as the act of such entity, he signed the foregoing instrument in its name on its behalf as its act and deed.

Witness my hand and Notarial stamp or seal, this _____ day of _____, 20_____.

Notary Public

My Commission Expires: _____
(Affix Seal)

BY
_____**(SEAL)** _____**(SEAL)**
_____, Licensee _____, Licensee

NORTH CAROLINA
JOHNSTON COUNTY

I, _____, a Notary Public for said County and State, do hereby certify that _____, Licensee and _____, Licensee, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, the _____ day of _____, 20_____.

Notary Public

My Commission Expires:
(Affix Seal)

BY _____ **(SEAL)**

LICENSEE

State of North Carolina - County of Johnston

I, the undersigned Notary Public of the County and State aforesaid, certify that

_____ personally came before me this day and acknowledged that
__he is the _____ of _____, a North Carolina
corporation/limited liability company/general partnership/limited partnership (strike through the inapplicable), and that by
authority duly given and as the act of such entity, __he signed the foregoing instrument in its name on its behalf as its act
and deed.

Witness my hand and Notarial stamp or seal, this _____ day of _____, 20_____.

Notary Public

My Commission Expires:
(Affix Seal)

EXHIBIT A

PLAN

EXHIBIT B

SCHEDULE OF INSURANCE

The insurance required by the Encroachment Agreement shall be as provided herein and written for not less than the following amounts, or greater if required by law:

1. Workers' Compensation

- a. Statutory Coverage for North Carolina
- b. Employers' Liability
 - \$500,000 per Accident
 - \$500,000 Disease Policy Limit
 - \$500,000 Disease Each Employee

2. Commercial General Liability (including Premises-Operations; Personal injury; Products and Completed Operations; Bodily Injury; Broad Form Property Damage and Contractual Liability). The Applicant shall include Smithfield and its employees, agents and consultants as additional insureds on the Commercial General Liability Policy.

- a. Combined single limit (bodily injury and property damage):
 - \$3,000,000 General Aggregate
 - \$1,000,000 Products & Completed Operations Aggregate
 - \$1,000,000 Personal and Advertising Injury
 - \$1,000,000 Each Occurrence
 - \$ 50,000 Fire Damage (Any One Fire)
- b. Property Damage Liability Insurance shall provide X, C, and U coverage.
- c. Products and Completed Operations insurance shall be maintained for a minimum period of two (2) years after completion of Work.
- d. Commercial General Liability Policy shall be endorsed to have the general aggregate apply on a "per project" basis.

3. Business Automobile Liability (including hired and non-owned auto coverage):

Combined Single Limit; \$1,000,000 Each Accident

4. Umbrella Policy

\$5,000,000 Over Primary Insurance & Self Insured Retention not to exceed \$5,000
Grantee may use any combination of primary and excess insurance to meet required total limits.

Certificates of Insurance acceptable to Town shall be filed with Town prior to commencement of any work. Coverage afforded under the policies will not be canceled, if not renewed, until at least thirty (30) days prior written notice has been given to the Town. Insurance carrier(s) shall be licensed and admitted to do business in the state of North Carolina.

EXHIBIT C

PERFORMANCE BOND

This Bond is executed on _____, 20__.

The name of the PRINCIPAL is _____(1)

a _____ (2)

The name of the SURETY is _____

The TOWN OF SMITHFIELD, NORTH CAROLINA is the CONTRACTING BODY.

The amount of the Bond is _____

_____ Dollars (\$ _____)

KNOW ALL MEN BY THESE PRESENTS, that we, the PRINCIPAL and SURETY above named, are held and firmly bound unto the above named CONTRACTING BODY, hereinafter called the "Contracting Body", in the penal sum of the amount stated above in lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas, the Principal entered into a certain Encroachment Agreement ("Agreement") with the Contracting Body, dated as of the ___ day of _____, 20__ for work described therein; a copy of said Agreement is hereto attached and made a part hereof.

NOW THEREFORE, if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said Agreement during the original term of said Agreement and any extensions thereof that may be granted by the Contracting Body, with or without notice to the Surety, and during the life of any guaranty required under the Agreement, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said Agreement that may hereafter be made, notice of which modifications to the SURETY being hereby waived, then, this obligation is to be void; otherwise it shall remain in full force and virtue.

IN WITNESS WHEREOF, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

ATTEST:

(Principal) Secretary
(SEAL)

Principal

By: _____(3)
(Name and Title)

(Address)

Witness as to Principal

(Address)

Surety

By: _____(4)
(Name)

ATTEST:

(Address)

By: _____
[N.C. Resident Agent]
(SEAL)

(Phone Number)

Witness as to Surety

(Address)

NOTE: Date of Bond must not be prior to date of Agreement.

- (1) Insert the correct name of Contractor.
- (2) Insert whether the Contractor is a corporation, a partnership, a limited liability company or an individual.
- (3) If Contractor is a partnership, all general partners should execute the Bond. If Contractor is a limited liability company, all managers (or all members, if the company is member-managed) should execute the Bond.
- (4) Provide contact name, address and phone number for performance bond surety.